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No. 92-1196

In The

Supreme Court of the United States

October Term, 1993

WALDEMAR RATZLAF AND LORETTA RATZLAF,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (hereinafter "NACDL") is a District of Columbia non-profit corporation, with membership comprised of more than 7500 lawyers and 28,000 affiliate members who are citizens of every state. Members serve in positions bringing them into daily contact with the criminal justice system as advocates or law professors. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL is concerned with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone of the criminal justice system is the essential role that the intent elements of a crime (including on occasion a "knowledge of the law" element) play in insuring that a statute does not reach innocent conduct. Beyond the particulars of the statute at issue here, NACDL is very concerned about any decision that would have broader implications regarding "ignorance of the law" and similar defenses, especially in regulatory crimes.

The *Amicus Curiae* Committee of the NACDL has discussed this case and decided that this issue is of such importance to defense lawyers and criminal defendants throughout the nation that the NACDL should offer its assistance to the Court. Both Petitioners and Respondent

have consented to NACDL's participation as *Amicus Curiae*. Letters of consent accompany the briefs filed with this Court.

ARGUMENT

I. INTRODUCTION

This case presents important issues pertaining to the mental elements of regulatory offenses. When previously legal activity is deemed a felony, what must the government prove regarding the defendant's state of mind? In particular the problem arises where, as here, the prohibited act is not inherently blameworthy. In such circumstances, may one be imprisoned for engaging in what he reasonably believes to be lawful and legitimate behavior, or must the government prove some state of mind, either knowledge or recklessness, regarding the fact of prohibition?

Amicus submits this brief because of the significant misunderstanding surrounding both the term "willful" and the concept of an "ignorance of the law" defense. "No area of the substantive criminal law has traditionally been surrounded by more confusion than that of ignorance or mistake of fact or law." 1 Wayne R. LaFave & Austin W. Scott, *Substantive Criminal Law* (1986), § 5.1 at 575.

We anticipate that the points raised in our brief actually should be unnecessary to the resolution of this case. Petitioners' discussion of the structure of the statute should conclusively resolve the matter: the need to impart to the word "willfully" in 31 U.S.C. § 5322 a single meaning, the same for violations of § 5324(3) as it has for violations of §§ 5316 and 5313, requires reversal of the court below. So too does the fact that § 5322 criminalizes

only "willfully violating" § 5324(3), therefore requiring some mental element beyond those involved in a mere violation of § 5324(3) (which is all the court below required).

Given these clear directives from the structure of the statute, there is no reason to undertake a broad-ranging exploration of the term "willful," with its various meanings in various federal criminal statutes. However, should this Court choose to engage in such an analysis, it will come to the same conclusion: the decision below must be reversed.

As is widely quoted, willful "is a word of many meanings, its construction often being influenced by its context." *Spies v. United States*, 317 U.S. 492, 497 (1943). Nevertheless, there are some underlying principles that can be extracted from the cases. These principles lead to the same clear result as the structure of the statute: a willful violation of § 5324(3) requires some mental element regarding the law's requirements, which as to § 5324(3) means the prohibition on structuring.

The *Scanio*[1] courts state that " 'willful' generally 'means no more than that the person charged with the duty knows what he is doing.' " *United States v. Scanio*, 900 F.2d 485, 489 (2d Cir. 1990) (quoting *American Surety v. Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925)). In contrast to

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[1] For simplicity *amicus* will refer to "the *Scanio* cases" or "the *Scanio* courts" when referring generically to the decisions holding that a conviction under §§ 5322 and 5324(3) involves no mental element regarding the prohibition on structuring, after *United States v. Scanio*, 900 F.2d 485 (2d Cir. 1990). *Scanio* was the first appellate decision to so hold, and its analysis has been relied upon heavily by many of the subsequent decisions, including that of the court below.

the *Scanio* cases' generalization is a recent pronouncement from this Court on the meaning of "willful." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). The lower court had stated that a violation was willful if the individual "knew or showed reckless disregard for the matter of whether [his] conduct was prohibited . . . " In short, it required far more than that the act be done intentionally; it required that the defendant act knowingly or recklessly as to the law's requirements.

This Court observed in *Thurston* that the lower court's definition "is consistent with the manner in which this Court has interpreted the term in other criminal and civil statutes," and further noted that the definition "has been applied by courts interpreting numerous other criminal and civil statutes." 469 U.S. at 624 and n. 20. *Accord, United States v. Bank of New England*, 821 F.2d 844 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987) ("the Supreme Court has endorsed defining willfulness, in both civil and criminal contexts, as 'a disregard for the governing statute and an indifference to its requirements.' ") (quoting *Thurston*.) The *Thurston* standard was applied by the First Circuit to §§ 5322 and 5324(3). *United States v. Aversa*, 984 F.2d 493, 500-501 (1st Cir. 1993) (*en banc*).

In fact, until recently the most often used jury instructions included an ignorance of the law element for all major crimes. Edward J. Devitt and Charles B. Blackmar, *Federal Jury Practice and Instructions* (1977), § 14.03 (serious crimes require proof that defendant knowingly did an act the law forbids, purposely intending to violate the law). That was especially the case whenever "willfulness" was an element of the crime. *Id.* at § 14.06 (act is done willfully if done with specific intent to do something the law forbids and with bad purpose either to

disobey or disregard the law.)[2] *Accord, Eleventh Circuit Pattern Jury Instructions, Criminal Cases*, § 9.1 (1985).

In recent years, there has been a rejection of the loose concept "specific intent" and a move toward the Model Penal Code approach of defining specific mental states for each element of the crime. *United States v. Bailey*, 444 U.S. 394, 403-406 (1980). The problem is that some courts, in reacting against the vagueness of "specific intent," have ignored the fact that for many statutes, particularly regulatory ones, one element of the crime does indeed involve some mental state regarding the law's provisions.[3]

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[2] Many cases have held that a "bad purpose" instruction need not be given, but have still recognized that an element of the crime was knowledge of the law's provisions. *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970) (prosecution for willful destruction of government property does not require proof of "bad purpose" but does require knowledge that defendant is breaching statute.) The court below must be reversed so long as this Court finds any mental element regarding the ban on structuring; "bad purpose" is not the issue.

[3] The use of the word "willfully," as opposed to "knowingly" or no modifier at all, has frequently been seen to evidence Congress's intent to require knowledge of the law's requirements. *See, e.g., United States v. Flores*, 735 F.2d 1499 (9th Cir. 1985) ("[T]he absence of words such as 'intent' and 'willfully,' which traditionally accompany specific intent crimes, supports our conclusion [that conviction under Federal Gun Control Act does not require proof of knowledge of duty to notify carrier before shipping firearms]"); *United States v. Sirhan*, 504 F.2d 818, 820 n. 3 (9th Cir. 1974) (discussing different jury instructions for "willful," as opposed to "knowing," crimes).

We could probably quote scores of cases summarizing the meaning of "willful" in criminal statutes, applying similar (or stricter) definitions to that in *Thurston*.[4] We know that the government could likewise cite scores of cases claiming that "willfully" generally means only "knowingly." Rather than relying on how some decisions generalize about the state of the law, it is probably more useful to look instead at the actual statutes, to see how "willful" is in fact applied in criminal law.

The broad range of statutes in which "willful" has been held to require some mental element as to the law's requirements, either actual knowledge or at least reckless disregard, refutes the *Scanio* cases' generalization – the element we submit is part of the crime of structuring is hardly a rarity in criminal statutes. The principles extractable from the cases show that, even though certainly in some statutes "willful" means only "intentional," § 5322 is not among them, whether applied to violations of

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[4] Several courts have confronted the issue of whether willfulness can be satisfied by a "reckless disregard" standard or whether, instead, a more exacting test such as "intentional violation of a known legal duty" is required. *See, e.g., United States v. Budzanosky*, 462 F.2d 443, 452 (3d Cir.), *cert. denied*, 409 U.S. 949 (1972). Although some courts have stated that they were rejecting an "ignorance of the law" defense, in fact they were still requiring some mental state as to the statutory prohibition, namely, recklessness. The court below held that there was no mental element required as to the prohibition on structuring, while the First Circuit *en banc* applied the "reckless disregard" standard to structuring violations. *Amicus* submits that the knowing violation standard is appropriate, to maintain consistency with the standard applied to the term "willful" in § 5322 for violations of § 5316 and other provisions of the Subchapter. However, either standard would require reversal of the court below.

§§ 5316 and 5313, or to § 5324(3). Thus, even absent the structure of the statutes, as detailed in Petitioners' brief, the only proper conclusion is that the court below erred. When combined with Petitioners' linguistic and structural analysis, the conclusion is simply inescapable that the crime of structuring requires some mental element regarding the prohibition on structuring.

II. BECAUSE STRUCTURING DEPOSITS TO TAKE ADVANTAGE OF THE $10,000 REGULATORY THRESHOLD IS NOT INHERENTLY BLAMEWORTHY, "WILLFULNESS" REQUIRES KNOWLEDGE THAT STRUCTURING IS PROHIBITED

A. WHERE THE ACTS CRIMINALIZED BY A STATUTE DO NOT INVOLVE INHERENTLY BLAMEWORTHY CONDUCT, THE TERM "WILLFULLY" REQUIRES PROOF OF KNOWLEDGE OF THE LAW'S REQUIREMENTS

In assessing what "willful" means in a particular statute, the courts have most frequently looked to whether the statute encompassed behavior that could be considered "innocent," absent knowledge of the law's provisions. For example, in *United States v. Lizarraga-Lizarraga*, 541 F.2d 826 (9th Cir. 1976), the court defined "willful" under 22 U.S.C. § 1934, pertaining to prohibitions on export of ammunition and arms. That statute, like § 5322, prohibited willfully violating any provisions of the relevant law. The court concluded that conviction requires proof that the defendant knew of the prohibition on export. In doing so, the court looked to the "exhaustive list of items" covered by the prohibition, many of which "might be exported or imported innocently."

> Under such circumstances, it appears likely that Congress would have wanted to require a voluntary, intentional violation of a known legal duty not to export such items before predicating criminal liability.

541 F.2d at 828.[5] Even some of the *Scanio* cases recognize this principle, although, as discussed below, they reach the wrong conclusion about the innocence of the behavior at issue here. *See, e.g., United States v. Dashney*, 937 F.2d 532 (10th Cir.), *cert. denied*, 112 S.Ct. 402 (1991) ("When typically innocent behavior is criminalized, there is a strong argument for requiring a person to have knowledge of the illegality of his actions to justify a conviction.")

The need for such a mental element, as a protection against criminalizing innocent conduct, has grown dramatically in recent years. This Court need not enter into the policy debate regarding the extent to which life and business in this country have become subject to pervasive governmental regulation; it need only acknowledge the obvious fact. And much of this regulation, while presumably necessary for protecting society from various evils, touches upon behavior that is not normally regarded as blameworthy.

Other courts have adopted a similar approach. If the court found that the conduct was "innocent" absent knowledge of its illegality, it interpreted the statute to require such knowledge, sometimes even absent the term

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[5] Other circuits have reached the same conclusion about § 1934 or its recodification at 22 U.S.C. § 2778(c). *See, e.g., United States v. Golitschek*, 808 F.2d 195, 203 (2d Cir. 1986); *United States v. Adames*, 878 F.2d 1374, 1377 (11th Cir. 1989); *United States v. Davis*, 583 F.2d 190, 193 (5th Cir. 1978).

"willfully" appearing in the statute. *See, e.g., Liparota v. United States*, 471 U.S. 419 (1985). Conversely, if the court determined that the conduct was not "otherwise innocent," it was less likely to find knowledge of the law to be an element of the crime. *See, e.g., United States v. Budzanosky*, 462 F.2d 443, 452 (3d Cir.), *cert. denied*, 409 U.S. 949 (1972) (prosecution for willfully falsifying labor union records under 29 U.S.C. § 439; court finds that imposing a lower mental state "will not operate as a trap for the unwary" because the prohibited acts are inherently deceptive practices).[6]

This "otherwise-innocent" analysis does not look to whether *all* behavior encompassed by the statute might be considered innocent. Instead, the question is whether *some* of the proscribed conduct meets that test. For example, in *Liparota*, this Court concluded that conviction under 7 U.S.C. § 2024(b), unauthorized use of food stamps, required proof of knowledge regarding what the law authorized. A significant underpinning to that conclusion was the recognition that the statute encompassed a broad range of innocent conduct. 471 U.S. at 427. But the facts in *Liparota* involved a shop-owner purchasing food stamps from undercover agents for substantially less than their face value, fairly clear evidence of fraud. *Id.* at 421. And certainly most people prosecuted under 7 U.S.C. § 2024(b) for food stamp violations would never have thought their actions were authorized by law. Nevertheless, in determining that the statute reached innocent

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[6] Notably, although the *Budzanosky* court relied on the inherent wrongfulness of the crime in rejecting a higher *mens rea*, it still found that "willfulness" entailed a reckless disregard of the law, the standard applied in *Aversa*.

behavior, this Court looked to the broad range of conduct that *could* be prosecuted if it held otherwise.

The lower courts have applied the same approach. For example, in *Lizarraga*, some of the proscribed items would obviously be subject to regulation. In fact, the defendant in that case was carrying ammunition secreted in various compartments of his truck, strongly suggesting that at the least he knew his acts were wrong. But these facts did not undo the risk that the statute encompassed some innocent behavior, at least as to other defendants. This led the court to the conclusion that "willfulness" entailed knowledge of the prohibition. Thus, the question before this Court is not whether the Ratzlafs or some other particular defendants were engaged in innocent conduct. Instead, this Court should determine whether some of the behavior § 5324(3) encompasses is innocent, absent knowledge of the prohibition.

B. ORGANIZING THE SIZE OF ONE'S BANK DEPOSITS, WITH THE KNOWLEDGE THAT THE SIZE OF THE DEPOSIT MAY ELIMINATE A REQUIREMENT OF REPORTING THE DEPOSIT TO THE GOVERNMENT, AND WITH THE INTENT TO TAKE ADVANTAGE OF THAT THRESHOLD REQUIREMENT, IS NOT BLAMEWORTHY CONDUCT

Many of the *Scanio* line of cases have considered the "otherwise innocent" argument and rejected it, on the grounds that structuring is not "innocent" activity, regardless of whether the individual knows of the ban on structuring. *Dashney*, 937 F.2d at 539 ("[I]n the context of the statutes before us, no wholly innocent person faces

such a predicament since a scienter element is incorporated into both 31 U.S.C. §§ 5324 and 5322.")[7] To explore these courts' proclamation that it is "non-innocent" to attempt to avoid the reporting requirement, we must first discern what they mean. Unfortunately, many of the opinions have not been terribly explicit. Three assertions regarding structuring's "non-innocence" are implied or stated: 1) those who structure are non-innocent because they are involved in other criminal activity; 2) in general, it is non-innocent to attempt to circumvent requirements of the law; and 3) in particular, it is non-innocent to attempt to deny the government information. All of these contentions are incorrect.

1. The Desire To Avoid Filing A CTR Can Be Motivated By Innocent Purposes And Does Not Necessarily Reflect Other Criminal Activity

No opinion has explicitly stated that all structurers are involved in other criminal activity, although one commentator has. Welling, *Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring*, 41 Fla. L. Rev. 286 (1989).[8] However, it would seem that this proposition implicitly underlies the *Scanio* courts' decisions,

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[7] This comment ironically highlights the point that *Dashney*, like the other *Scanio* cases, actually ignores the different scienter elements incorporated into § 5322 and § 5324(3). Those cases only require the "intent to evade" element of § 5324(3), without also applying the additional, "willfully" element of § 5322.

[8] "[N]o legitimate reason exists to resist reporting large cash transactions," *id.* at 310; "[T]he only reason to avoid the reporting law is to hide other crime," *id.* at 314; and "Smurfing arises only in the wake of an effort to evade another law." *Id.* at 317.

which might explain their strained reading of the statutory language, in which they ignore the differing meanings they impose on § 5322's "willfully" and likewise ignore how they render that term redundant. If those courts in fact believed as Welling does, they were wrong. As other courts have recognized, that is simply not the case: there are non-criminal reasons for structuring.

For example, in *United States v. Dollar Bank Money Market Account*, 980 F.2d 233 (3d Cir. 1992), a forfeiture case under § 5324(3), it was undisputed that the funds were a widow's "cash horde" of legitimately derived funds. 980 F.2d at 233. The funds were given to her nephews, who intended to pay her expenses as her health declined. 980 F.2d at 235. The case involved "legitimate money earned by hard working people rather than criminals stashing profits from an illegal enterprise." 980 F.2d at 242 (Greenberg, J. dissenting from holding that § 5324(3) requires knowledge that reporting requirement is a legal requirement, rather than bank policy, but acknowledging "obvious humanity" of majority's position, given legitimacy of funds deposited).

In response to a summary judgment motion, the claimant alleged that his reason for structuring was to maintain his aunt's privacy regarding the funds, to maintain his own privacy, and to avoid the danger that "if news were publicized that an eccentric old woman hid hundreds of thousands of dollars in her house, some people would attempt to burglarize it." 980 F.2d at 241. His explanations were characterized as "legitimate," and his need for privacy was deemed "credible" by the court, which noted that the aunt's home was in a deteriorating neighborhood. *Id.* The claimant received legal advice to

the effect that structuring was a lawful means of accommodating these privacy interests.

Although the government apparently only resorted to forfeiture and not a criminal prosecution in *Dollar Bank*, a ruling by this Court in the government's favor would certainly allow prosecutions under such facts. The aunt and claimant in *Dollar Bank* are hardly unique in their wish to maintain financial privacy, not out of a desire to hide criminal activity, but for legitimate reasons. Some may act simply out of personal beliefs that their financial holdings (as opposed to their taxable income) are no one's business, others out of concern that disclosure of their finances could lead to burglary or similar problems. The reported decisions reveal other examples of "innocent" structuring; how many thousands more are there which are unreported because the government is unaware of them or, as an exercise of prosecutorial discretion, has chosen not to indict?

The district court opinion that led to the First Circuit's *en banc* decision in *Aversa*, *United States v. Aversa*, 762 F. Supp. 441, 448 (D.N.H. 1991), likewise involved defendants whose activities were "innocent," but for the prohibition of which they were unaware:

> One thing that is perfectly clear to the court is that this is a case that was never contemplated by the drafters of the statute and is a case that never should have been brought by the United States Attorney. There are enough drug dealers and racketeers out there that are legitimate targets of this statute; the United States Attorney should not be wasting the government's time and money charging a man the government admits was not involved in drugs and not laundering ill-gotten gains and not keeping any information from the United States.

See also United States v. Baydoun, 984 F.2d 175, 182 (6th Cir. 1993) (government concedes that cash was nontaxable and that drug monies were not involved; court finds it "clear that there was no attempt by defendant Baydoun to engage in money laundering or to evade taxes due the IRS").

Welling, contrary to her blanket assertion that all structuring is related to criminal activity, appears to acknowledge the existence of, and perhaps even the legitimacy of, privacy-motivated structuring, Welling, 41 Fla. L. Rev. at 310 and 314. Welling then argues that the government's need to know about cash deposits outweighs these individuals' privacy interests. *Id.* at 310. We do not dispute Congress's authority to make that determination. But that point only establishes that a law barring structuring is valid, a point not at issue in this case. It does not at all support the conclusion that all structuring is inherently non-innocent, such that Congress would have intended to incarcerate even those who structure in the mistaken believe that it is a legitimate and legal means of maintaining their privacy.

2. The Mere Desire To Take Advantage Of A Regulation's Threshold, In Order To Avoid Coming Within The Regulation's Requirements, Is Not Inherently Blameworthy

Beyond the supposed "non-innocence" of structuring because of its allegedly criminal purposes, the *Scanio* courts contend that there is something inherently wrong with attempting to get around a regulation's impact. "In requiring both that a defendant know of the reporting requirements and act to evade them, Congress insured

that the innocent and the unwitting would not be ensnared in the statutory net." *United States v. Rogers*, 962 F.2d 342 (4th Cir. 1992). In the view of these courts, acting with the intent to evade the reporting requirement is itself non-innocent behavior. To explore this contention, one should first get around the pejorative connotations of the word "evade." In the area of tax law, "evade" denotes a situation where one knows that, notwithstanding whatever tax-avoidance steps one has taken, tax is due and one fails to pay it anyway (often using various machinations to hide the fact that tax is due). To "avoid" a tax is merely to take steps that actually result in the tax not being due.

As applied by the *Scanio* line of cases, however, "willfully evading" requires no more than an intent to take one's deposits outside the purview of the reporting requirement, by causing each individual deposit to be below the reporting threshold. This definition lacks the "knowledge of impermissibility" denotation that "evasion" has in tax law, but unfortunately carries the same concept as an unspoken implication. In fact, the intent required by the *Scanio* cases could be characterized in several ways, as an intent to "evade" the regulation, to "circumvent" or "get around" it, to "frustrate it" (as the trial court below instructed the jury), or simply to "avoid its impact."

Put in these more neutral terms, the fallacy in the *Scanio* courts' premise about structuring's inherent "non-innocence" can readily be seen. An attempt to change the form of a transaction, for purposes of avoiding what would otherwise be required by regulation, is not "non-innocent behavior." It is a fact of business life in this country that much of how one conducts one's affairs is

done with an eye to regulatory or other legal impact. And since much of the law is based upon rules governed by form, frequently one will arrange the form of one's business to avoid the impact of a particular law. Whether desirable or not, this is an extremely pervasive reality. In short, *Rogers*, in the comment quoted earlier, simply begs the question: it is certainly true that structurers are not unwitting, in that they do know of the reporting requirement. 962 F.2d at 345. They may, however, be unwitting in that they may wrongly believe that for this regulation, like most others, it is permissible to rely upon and take advantage of threshold and formal requirements. For that reason, *Rogers* is quite wrong in asserting that the elements of § 5322 and § 5324(3), as interpreted by the *Scanio* cases, insure that the innocent will not be ensnared.

To take one example, come year end thousands of taxpayers will give a gift of $10,000 to someone on December 31 and another $10,000 gift on January 1. If they gave $20,000 on December 31, they would have to file a form with the IRS. 26 U.S.C. § 2503(b). In addition, at their death, their estate might be liable for additional taxes, depending on the estate's size. But by taking advantage of a "loophole" in the tax laws based upon a threshold, by manipulating the timing of their gifts to keep under the threshold, these taxpayers need not file any form. We doubt that anyone would consider these actions non-innocent, even if one might question the wisdom of the extent to which the nation's tax and regulatory structure is based on form over substance. This innocence is despite the fact that the taxpayers are taking advantage of the literal requirements of a regulation in order to avoid filing an IRS form.

How is gift structuring different from currency structuring (which also involves simply timing one's actions to keep under a threshold), in terms of their inherent innocence? We submit that the only real difference is the presumption by various appellate judges that many or most structurers are actually engaged in criminal activity, such as laundering drug money or tax evasion. But it is that underlying criminal activity, with the motive of hiding it through structuring, which is "non-innocent." Structuring performed solely with the motive of maintaining privacy is indeed innocent, even though done with the knowledge that, absent the structuring, a report would be required. It is only the knowledge that structuring is prohibited that makes it worthy of punishment.

The Ninth Circuit stated that "Defendants' confusion lay in their belief that the law would tolerate a scheme to circumvent that regulatory mechanism." *United States v. Pitner*, 979 F.2d 156, 161 (9th Cir. 1992). It is actually the Ninth Circuit which displays confusion, because the belief is widespread that the law generally tolerates taking advantage of the literal terms of a regulation. And that belief is accurate; the Pitners' mistake was a reasonable one, and the law should not ensnare those who innocently believe their conduct is permissible.

In short, many citizens, particularly those in the business world, see nothing "non-innocent" about organizing their activities to get around some particular regulation.[9]

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[9] The observation in *Dashney*, 937 F.2d at 540, that "Dashney's actions were anything but innocent, as he went to great lengths to avoid the filling out of CTRs in connection with his transactions" is a total *non sequitur*. The fact that one's method of avoiding a particular regulation happens to require going to

To suddenly bar one particular mode of organizing transactions is totally appropriate. But to make felons of those who engage in that structuring, regardless of their belief in its legitimacy and legality, is grossly unfair. This Court, applying the approach in *Liparota*, should not attribute to Congress such unjust results absent far clearer language in the statute. As the district court stated in *Aversa*:

> There are many occasions in the life of a businessman in which he structures transactions in order to avoid the impact of some regulation or tax. One may structure a company to reduce tax liability, one may structure a transaction over the course of several years to change the way a regulation affects them. If one is not trying to deprive the government of something to which the government is entitled, there is nothing illegal about such structuring. Daniel Aversa and Vincent Mento thought that this was true of the structuring of currency transactions.

Aversa, 762 F. Supp. at 446.

What possible justice is there in imprisoning an individual who, wishing to maintain financial privacy, does everything possible to ensure he is acting within the law

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great lengths says nothing about the innocence of one's actions. If an intent to avoid a regulation's impact is never innocent, that is so regardless of the simplicity of one's avoidance technique. Conversely, if such intent can be innocent, as we assert, it is no less innocent just because that particular regulation's structure may necessitate taking several steps to avoid it, especially if one has received legal advice that those steps are permissible. In any event, even if Dashney himself went to "great lengths," one need hardly go to "great lengths" to violate § 5324(3); one need simply break up more than $10,000 into two quantities and make separate deposits. To the extent there is any correlation between innocence and the simplicity of regulation-avoidance, certainly § 5324(3) encompasses quite simple behavior.

by checking with legal counsel, *Dollar Bank*, *supra*, or conferring with the bank? This is truly innocent conduct, yet the standard enunciated by the *Scanio* cases allows no such defense. *See, e.g., United States v. Hoyland*, 914 F.2d 1125, 1128 (9th Cir. 1990). *See also United States v. Jackson*, 818 F.2d 345, 346 n. 2 (5th Cir. 1987) (advice of counsel no defense if it does not negate an element of the offense).

3. The Mere Desire To Limit The Government To Only That Information It Requires Is Not Inherently Blameworthy

While acknowledging that conviction for otherwise-innocent conduct normally requires proof of an awareness of the law's requirements, *Scanio* suggests that structuring involves "bad purpose" because it entails an intent "to deprive the government of information to which it is entitled." 900 F.2d at 491. But that assumes the conclusion. Under the regulations, the government is entitled to the information only if the transaction is over $10,000. It would be more proper to say "information to which the government would be entitled, had the defendant not organized his deposits. . . . " So far as is known by someone aware of the reporting requirement, but unaware of § 5324(3), the government is no more entitled to this information than the government is entitled to gift tax returns when $20,000 is given over two days, December 31 and January 1.

It is certainly legitimate for the government to bar structuring, thereby prohibiting people from changing the form of their transactions in a way that makes the government no longer entitled to the information. But it is not correct to call it "non-innocent," and use that as a justification for eliminating a mental element, when

someone thinks he can take advantage of the specific terms of this regulation by re-organizing his activity, just as the letter of so many other laws can be used to advantage.

Welling, 41 Fla. L. Rev at 309, takes an approach similar to *Scanio*, arguing that the evade-avoid analogy to tax statutes fails because when a citizen "structures to avoid taxes, [he] saves money but still provides information to the government. In contrast, when [he] structures to avoid the bank reporting law, he denies the government information." But what is so special about regulations seeking information? How is an intent to organize one's activities around the formalities of a regulation particularly pernicious when the motive is to deny the government information? Many laws seek information for the government, including the gift tax return based upon meeting a threshold within a calendar year. Some other laws seek taxes for the government, and some have other effects. The point is that the laws have varying impacts on citizens, establishing obligations and bestowing rights. So long as those laws have formal requirements, many people will change the form of their activities to reap the maximum benefit, or suffer the minimum obligation, that the particular requirements of a particular law allow. So long as society considers such structuring to be generally acceptable, or even tolerable, the courts cannot characterize the mere desire to avoid a regulation's impact as "non-innocent," even if the impact in some cases is providing the government with information. And since no other aspect of currency structuring can fairly be called "non-innocent," it is the sort of statute where "willful" has consistently been held to require some mental state as to the law's requirements.

4. Conclusion

The discussion of "innocence" by the court below totally misses the mark:

> Finally, this case presents little risk that persons who engaged in "innocent" actions stand unjustly convicted of structuring. The Ratzlafs were aware of the reporting requirements, and the evidence indicates that the Ratzlafs apparently were seeking to avoid payment of their income taxes. The couple took no-steps to insure that the IRS would be aware of the assets used to purchase the cashiers checks; denied that they earned money from gambling when in fact they had done so; denied any failure to report gambling income; and apparently hid large amounts of currency in or near their home. The Ratzlafs cannot be compared to an individual involved in perfectly ordinary business transactions who unconsciously breaks the currency laws.

United States v. Ratzlaf, 976 F.2d 1280, 1287 (9th Cir. 1992). The first item mentioned, knowledge of the reporting requirements, alone does not establish non-innocence. Otherwise, any attempt to avoid any regulation would be non-innocent, a proposition discussed and rebutted in detail in part II.B.2 *supra*. The remaining factors, intended to suggest that the Ratzlafs were evading taxes and lying to the government, may establish non-innocence on the Ratzlafs' part. But they hardly establish that *no* structurers act innocently. Those who are not trying to evade taxes, who act only out of privacy or other personal motivations, are indeed comparable to ordinary business transactors.

As discussed earlier, this Court, when determining the elements of 7 U.S.C. § 2024(b) in *Liparota*, did not rely

on the apparently fraudulent activity of Liparota himself, when he sold food stamps to an undercover investigator for below face value. Instead, this Court recognized that it was determining the elements of that statute for *all* prospective defendants and looked to what kinds of behavior might be encompassed by the statute.[10]

Unfortunately, the *Scanio* cases have analyzed § 5322 and § 5324(3) in a one-sided manner: when the particular defendant appeared to be engaged in other criminal activity, the courts have emphasized that fact in determining the elements of the crime. But in other cases such circumstances were lacking. And at times, the defendants in those cases acted on advice of the bank or counsel that § 5324(3) was, like most regulations, one which could be avoided by making sure not to exceed its threshold. In these latter cases, the courts have applied the same unforgiving elements of the crime as in the former cases, thus leading to the criminalization of otherwise-innocent behavior.

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[10] That analysis was conducted in the face of a dissent that characterized the examples as "bizarre mutation[s]," "wholly academic" hypotheticals presuming "wildly unreasonable conduct by government officials." 419 U.S. at 437 n. 3 (White, J. dissenting). As to § 5324(3), however, there is no question that the government has prosecuted people uninvolved with illegal activity and with a good faith belief their conduct was lawful. See part II.B.1 *supra*. Thus, even if this Court were to exclude academic hypotheticals, as suggested by the *Liparota* dissent, it is clear that § 5324(3) encompasses behavior that is innocent, absent knowledge of the prohibition of structuring.

III. DEPOSITORS OF CASH ARE NOT ON NOTICE OF THE LIKELIHOOD THAT ORGANIZING THE SIZE OF THEIR DEPOSITS IS THE SUBJECT OF REGULATION

Another thread to the courts' interpretation of "willful" is whether an individual is on notice of the likelihood of regulation.

> The primary purpose of the law, and the criminal law in particular, is to conform conduct to the norms expressed in that law. When there is no knowledge of the law's provisions, and no reasonable probability that knowledge might be obtained, no useful end is served by prosecuting the "violators."

United States v. Mancuso, 420 F.2d 556, 559 (2d Cir. 1970). This is closely related to the "otherwise-innocent" question, since if one is aware that his behavior is regulated, his violation of the regulation cannot be deemed "innocent."

Those *Scanio* courts considering this question have concluded that violators of § 5324(3) are indeed put on notice of the likelihood of regulation. The most detailed discussion is in *Scanio* itself, after a reference to *Mancuso*:

> In the present case, however, Scanio was not prosecuted for having failed to comply with an obscure reporting requirement; he was charged with having intentionally structured a currency transaction with the explicit purpose of evading what he knew to be the bank's legal duty to file CTRs for all transactions exceeding $10,000. Scanio engaged in affirmative conduct and demonstrated an awareness of the legal framework relative to currency transactions which, it is reasonable to conclude, should have alerted him to the consequences of his conduct.

900 F.2d at 490. That argument, however, utterly fails. The only "awareness of the legal framework" necessarily demonstrated by one who structures is knowledge that, if he deposits more than $10,000 at one time, a report must be filed. That knowledge would hardly alert one to the existence of the ban on structuring in § 5324(3).

Using *Scanio's* logic, every single regulation in this country puts one on notice of the potential that attempts to circumvent that regulation might be prohibited. But as we discussed at length in part II.B.2, much of the business world is devoted to changing the form of a transaction to take advantage of how that transaction's form implicates a regulation or not. In fact, most regulations are not subject to a bar on seeking to avoid them. We submit that most people would heartily reject the notion that every time there is a regulation, they are on notice of the likelihood that for that regulation, unlike most others, one cannot change the form of one's transactions to benefit from the letter of the regulation.

Following the discussion quoted above, *Scanio* cites to *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971). There is no justification for the *Scanio* court to draw an analogy between the depositing of cash and the transportation of dangerous chemicals involved in *International Minerals*. With hazardous materials, one is on effective notice that one's behavior is subject to detailed regulation; the same cannot be said of bank deposits. In fact, in *International Minerals* the transporter was required by law to be familiar with the various regulations, 402 U.S. at 569 and n. 4 (Stewart, J. dissenting).

A similarly unwarranted analogy was drawn in *Hoyland*, the precedent on which the decision below relied.

The Ninth Circuit observed that "[t]he statute is like the narcotics statutes construed in *Balint* [*United States v. Balint*, 258 U.S. 250 (1922)] and *Behrman*, [*United States v. Behrman*, 258 U.S. 280 (1922)] *supra*; intent to do the act suffices." 914 F.2d at 1129-1130. If the court was only stating that its holding regarding § 5322's mental elements makes the statute comparable to the narcotics statutes, the comment is unedifying. If instead the court was asserting that the anti-structuring statute is like narcotics statutes and *therefore* intent to do the act suffices, its premise is significantly flawed. In just what way is cash like narcotics?

Welling, 41 Fla. L. Rev at 316-318, contains a more extensive discussion of the "likelihood of notice" issue than any of the *Scanio* cases do. Although she ultimately concludes that knowledge of the ban on structuring is not an element of the crime, part of her discussion in fact rejects these points made by the *Scanio* and *Hoyland* courts. As she states, one relevant factor is whether the field involved "a highly regulated substance like alcohol." She concedes that "[r]egulation of cash transactions is not as pervasive." Similarly, the nature of the substance is relevant, because dangerous items, such as firearms or toxic substances, are known to be regulated. "[T]he basic commodity of the anti-smurfing law is cash transactions, which are difficult to put in the specialized category with acid and toxic waste." *Id.* at 313.

Welling makes three points that supposedly show that a defendant will know of a high likelihood of regulation. The first is that structuring is "not morally pure" and therefore known to be subject to regulation. But the premise underlying this assertion is that structuring "arises only in the wake of an effort to evade another

law," *id.* at 317, a contention we debunked in part II.B.2. The second point is the same as *Scanio's* fallacy, namely that knowledge of the reporting requirement should lead to knowledge of the ban on structuring. A related contention is that someone contemplating structuring "should question whether such easy evasion is too good to be true." Welling, 41 Fla. L. Rev at 318. One could as easily say that of any regulation with a threshold or some means by which its impact can readily be avoided. Are business people on notice that every regulation which can be circumvented easily, instead of through expensive and complex means, in fact may not be circumvented? Welling's assertion is simply nonsensical.

IV. THIS COURT'S DECISION IN *CHEEK V. UNITED STATES* HAS NO RELEVANCE TO WHETHER IN A PARTICULAR NON-TAX CRIMINAL STATUTE, "WILLFULNESS" REQUIRES KNOWLEDGE OF THE LAW'S PROVISIONS

In *Cheek v. United States*, 498 U.S. 192 (1991), this Court looked at the meaning of "willfully" under 26 U.S.C. §§ 7201 and 7203 of the tax code. It was already well-established that the term, as used in those statutes, required proof of a voluntary, intentional violation of a known legal duty. *Id.* at 201. The only question before this Court in *Cheek* was whether an objectively unreasonable misunderstanding of the law constituted a defense to that mental element. *Id.*

In the course of introducing the issue before it, this Court in *Cheek* noted "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution. . . . " *Id.* at 199. Several of the post-*Cheek* decisions have seen this as a holding that knowledge of

the law's requirements is non-existent, or at most a rarity, outside the criminal tax laws. The tenor of the opinions is that if the crime of structuring is distinguishable from tax offenses, then it certainly does not require knowledge of the law's requirements. But the numerous decisions interpreting non-tax crimes, across a very broad range of types of statutes, refutes any such suggestion. Surely this Court was not *sub silentio* reversing the literally scores of decisions, analyzing literally dozens of statutes, that have concluded there was some mental element regarding the requirements of a particular (non-tax) law.

The *Scanio* cases which discuss *Cheek* are reading far too much into it by finding therein promulgation of a *rule* of statutory construction, where in fact this Court was merely *generalizing* about statutes not then in issue. Thus, *amicus* is not asking, as contended in *Rogers*, "that the interpretation of 'willful' in the tax laws should be extended to this offense." 962 F.2d at 344. Rather, we are asking that this Court apply the traditional definition of "willfully," that found in numerous other non-tax statutes, especially those involving otherwise-innocent behavior.

Some of the *Scanio* courts conclude that *Cheek* is distinguishable because the currency regulations are not comparable to the tax laws in their complexity. *Pitner*, 979 F.2d at 161; *Ratzlaf*, 976 F.2d at 1284, 1285; *Rogers*, 962 F.2d at 344. Certainly in the tax arena, the complexity of the law has been a major motivating factor behind the court's conclusion that knowledge of the regulation is an element of the offense. *Cheek*, 498 U.S. at 199-200. But the cited cases are in effect holding that willfulness does not entail knowledge of the law's requirements *unless* the regulatory scheme is highly complex. That assertion does not

follow logically from cases such as *Cheek*, nor is it an empirically correct statement about the law.

The belief that it is unfair to prosecute in a complex regulatory scheme, absent knowledge of the regulation, does not logically support the conclusion that knowledge of a regulation is an element *only* when there is a complex scheme. In fact, the courts have frequently found a knowledge of the law element when the regulatory scheme was actually quite simple. The most obvious example is in the very statute under review here, § 5322, where every circuit to address the issue had concluded that to willfully violate § 5316 requires knowledge of the reporting requirement. The requirement to declare more than $10,000 in currency when crossing the border is hardly complex. Nor is the law requiring 18 year old males to register with the Selective Service. *United States v. Kerley*, 838 F.2d 932, 936 (7th Cir. 1988).

The post-*Cheek Scanio* decisions, in concluding that *Cheek* actually supports their position, note that *Cheek* was predicated in part on protecting innocent behavior, whereas these courts viewed structuring as non-innocent. *Pitner*, 979 F.2d at 160; *Ratzlaf*, 976 F.2d at 1284; *Dashney*, 937 F.2d at 540. We discussed at length in part II.B this mistaken assertion that structuring cannot be undertaken innocently. In a related point, *Pitner* distinguished *Cheek* because *Cheek* involved a defense of good faith mistake regarding the law's requirements, whereas Pitner did not raise that defense. 979 F.2d at 160 n. 4. However, the standard enunciated in *Pitner* and the other *Scanio* cases allows no good faith defense, even for those individuals whose belief that the reporting requirements may lawfully be avoided comes from the advice of lawyers or bank employees.

As noted earlier, the concept of "ignorance of the law" as a defense is a source of much confusion. It is worth quoting in detail the comments in *United States v. Golitschek*, 808 F.2d 195 (2d Cir. 1986), regarding the maxim "ignorance of the law is no excuse."

> To put the matter more generally, a defendant normally need not be shown to know that there was a law that penalizes the offense he is charged with committing. However, he must be proven to have whatever state of mind is required to establish that offense, and sometimes that state of mind includes knowledge of a legal requirement. . . . When we say that ignorance of the law is no excuse, or, as was said in this case, that everyone is presumed to know the law, we mean only the law that makes the offense punishable, not the law that in some circumstances sets out legal requirements that must be known in order to have committed the offense. The distinction is not the less vital because it is subtle.

808 F.2d at 202-203.

Amicus does not contend that structuring defendants must be proven to have knowledge that § 5322 makes structuring punishable. But they must be shown to have knowledge of § 5324(3)'s requirement, namely that one not structure his transactions in an attempt to escape § 5313's reporting requirement. For all the reasons discussed above and in Petitioners' brief, Congress's choice of the term "willfully" in § 5322 is a clear indication that it required proof of that mental element.

V. CONCLUSION

Amicus believes that this case may have significance far beyond prosecutions under § 5324(3). It is one of the

rare occasions in which this Court confronts the issue of when a good faith ignorance of the law's requirements may be a defense to a crime.

In an era when all or most of the laws reflected society's norms, the issue was of little significance. Almost any person violating the law had made a conscious choice to engage in blameworthy conduct, and it was fair to put the risk upon him that he was wrong about the law's ambit.

But today, the reach of regulatory statutes touches every facet of people's lives. Behavior that is legal one day suddenly becomes illegal, and punishable by years in prison, with no effective notice. It would be grossly unfair to say that people act at their peril regarding the legality of their activity, when their conduct is comparable to other, totally legal actions taken in the business world every single day. The unfairness increases when a person contemplating such conduct makes a good faith inquiry into the law's provision, but happens to receive mistaken advice. *Amicus* submits that Congress fully recognized the risk that the currency laws could reach innocent behavior and therefore erected "willfulness" in § 5322 as an added protection beyond the intent elements of the various requirements and prohibitions. That protection applies just as much as structuring under § 5324(3) as to other violations of the currency laws. The decision of the court below should be reversed.

Respectfully submitted,

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